

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

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| ERINN CHIOMA, | : | |
| | : | |
| Charging Party, | : | |
| | : | <u>ULP No. 08-12-643</u> |
| v. | : | |
| | : | Probable Cause Determination |
| RED CLAY CONSOLIDATED SCHOOL DISTRICT, | : | and Order of Dismissal |
| | : | |
| Respondent. | : | |

BACKGROUND

The Red Clay Consolidated School District (“District”) is a public school employer within the meaning of 14 Del.C. §4002(q).

The Charging Party, Erinn Chioma (“Chioma”), is a public school employee within the meaning of §4002(p) of the Public School Employment Relations Act (“PSERA”). She is a member of the bargaining unit of professional, certificated employees of the District, which is currently represented by the Red Clay Education Association, DSEA/NEA (“RCEA”).

On or about December 30, 2008, Chioma filed an unfair labor practice charge alleging that the District violated 14 Del.C. §4007(a)(1) and (4):

(a) §4007 It is an unfair labor practice for a public school employer or its designated representative to do any of the following:

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint, or has given information or testimony under this chapter.

The Charge alleges Chioma was singled out for discipline for inappropriate use of the District's electronic mail (e-mail) system. The Charge asserts Chioma has a right to file a decertification petition and that she is the "victim of retaliatory actions" (including this discipline) because she has been the "complainant in a discriminatory investigation conducted by the state Department of Labor and the federal Department of Education, Office of Civil Rights." The Charge also alleges other employees who have sent e-mails through the District's system which are unrelated to District business have not been similarly reprimanded, thereby accusing the District of a "lack of impartiality, discrimination and bias." *Charge*, ¶¶1 & 2.

On January 9, 2009, the District filed its Answer to the Charge denying all material allegations. The District denies that Chioma was disciplined; rather she was verbally counseled and reminded of the expectation that all District employees must comply with the State's Acceptable Use Policy (A Guide to Behavior in Using the State's Communications and Computer Systems). A letter was placed in her personnel file which memorializes the meeting and advising her to refrain from using the District's computer system and time to "e-mail staff concerning her personal opinion concerning RCEA." *Answer*, ¶ vii.

This Probable Cause Determination is based upon a review of the Charge and Answer filed in this matter.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the

Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.

- (b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

The pleadings establish that at some point prior to 9:05 a.m. on December 11, 2008, Chioma was contacted by the District's Human Resource Manager:

A meeting is scheduled for Tuesday, December 16th for 8:00 a.m. at Shortlidge Elementary School. The topic will be the use of RCCSD time and computers.

Please report to the main office.

It is recommended that your union representative attend the meeting.

The meeting was conducted as scheduled. The Charge asserts:

- iii. Ms. Chioma was informed the meeting specifically regarded a mass e-mail, which according to representative of respondent [the Human Resources Manager] was considered usage of District computers for non-related district business
- iv. Chioma responded that the e-mail was transmitted at 8:19 a.m., one minute before the official beginning of work day. The contents of the email was information regarding a decertification petition, sent to all members of the collective bargaining unit. [The Human Resources Manager] responded that some employees received the notice at 8:26 a.m.
- v. Chioma posited the fact that she has documented emails received during the workday (15 different emails, all occurring within the proceeding week) regarding Avon sales, private holiday parties, and other solicitous matter. [The Human Resource Manager] responded his concern was Chioma's matter – not the others. The fact that the e-mail was regarding "union" information was disregarded.

- vi. Chioma relayed during the meeting of her sentiment of 'being singled out'. [The Human Resource Manager's] response was that he had made several other similar disciplinary actions towards other employees. To Chioma's knowledge the emails she received the preceding week were not the subject of any disciplinary actions.
- vii. [The Human Resource Manager] confirmed documentation of this meeting would be included in employees [sic] file.

The District denies that Chioma was disciplined and provided numerous letters counseling other employees concerning the acceptable use of the District's e-mail system (and included a copy of that policy). It also included the letter which was placed in Chioma's personnel file:

On Tuesday, December 16th a meeting was held to discuss the district's concern with your use of district time and the district computer system.

It was stated that the expectation of the district is that you will follow the Acceptable Use Policy of the State and the District. Furthermore, you will refrain from using the district computer system and/or district time to e-mail staff regarding your personal position regarding the RCEA.

If you have any questions you may contact my office ... *Answer, Exhibit C.*

The Rules and Regulations of the Delaware PERB require that upon completion of the pleadings in an unfair labor practice proceeding, a determination shall be issued as to whether those pleadings establish probable cause to believe the conduct or incidents alleged could have violated the Public School Employment Relations Act, 14 Del.C. Chapter 40. DE PERB Rule 5.6. For purpose of this review, factual disputes revealed through the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing what may prove to be a valid charge without the benefit of receiving evidence concerning that factual dispute. *Richard Flowers v. State of Delaware, Department of Transportation, Delaware Transit Corporation, Probable Cause Determination, ULP No. 04-10-453, V PERB 3179 (2004).*

The statute requires a Charging Party to allege facts in the complaint with sufficient specificity so as to, first, allow the Respondent to provide an appropriate answer and second, to provide facts on which PERB can conclude there is a sufficient basis for the charge. The Charge must also explicitly link the factual allegations to the “specific provision of the statute alleged to have been violated.” DE PERB Rule 5.2. The initial burden rests on the Charging Party to allege facts that support the charge that §4007 of the PSERA has been violated.

In this case, the Charge alleges the District has interfered with, restrained or coerced Chioma in or because of the exercise of any right guaranteed under the PSERA. The test of an (a)(1) violation is not whether an employee was actually intimidated, coerced or restrained, but whether the conduct reasonably tended to interfere with the free exercise of employee rights. Employee rights are defined at §4003, and include the right to:

- (1) Organize, form, join or assist any employee organization, provided that membership in, or an obligation resulting from collective bargaining negotiations to pay any dues, fees, assessments or other charges to an employee organization shall not be required as a condition of employment for certified professional school employees.
- (2) Negotiate collectively or grieve through representatives of their choosing.
- (3) Engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any without discrimination. *14 Del.C. §4003.*

The Charge does not set forth a specific or identifiable factual basis to support the allegation of intimidation, restraint or coercion by the District. Chioma asserts she has a right to petition for a decertification vote. A decertification petition must be made to PERB, not to the District. The statute does not protect or provide an individual employee

with unfettered access to the resources of the District to promote a decertification petition. At no time relevant to this Charge was a petition for a decertification election involving the bargaining unit of certificated, professional employees of the District filed or pending.

In order to constitute an (a)(1) violation, employer conduct must either on its face or through surrounding circumstances reasonably tend to exert undue influence and/or coerce employees. *WFFA Local 1590 v. City of Wilmington*, ULP 93-06-085, II PERB 937, 976 (1994). Chioma was counseled concerning the appropriate use of the District's resources, namely its computer system. There is no factual support on which to conclude a negative employment action was taken. Consequently, there is an insufficient factual basis to support the Charge that the District violated 14 Del.C. §4007(a)(1) and that charge must be dismissed.

Secondly, the Charge asserts the District violated 14 Del.C. §4007(a)(4) by discriminating against Chioma because she signed or filed an affidavit, petition or complaint, or has given information or testimony. The statute, however, requires that such discrimination must have occurred as a result of an action taken and protected under this chapter. Although Chioma asserts she has been a complainant in investigations conducted by the Department of Labor and the U.S. Department of Education, the Charge does not detail any action taken by Chioma which is protected by the PSERA.

For this reason, the Charge of a §4007(a)(4) violation also fails to establish probable cause to believe that an unfair labor practice has occurred.

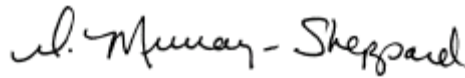
DETERMINATION

Consistent with the foregoing discussion, even when considered in a light most favorable to the Charging Party, the pleadings provide an insufficient basis for finding probable cause to believe that an unfair labor practice may have occurred.

WHEREFORE, the Charge is hereby dismissed without prejudice.

IT IS SO ORDERED.

DATE: February 9, 2009

A handwritten signature in cursive script, reading "D. Murray-Sheppard", written in dark ink.

DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.